Supreme Court, U.S.
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No. 98-1671

IN THE

Supreme Court of the United States

CECIL PICARD, *et al.*,

Petitioners,

v.

MARY L. HELMS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a general educational aid program which includes separate allocations to participating sectarian elementary and secondary schools and is administered by a local school district so as to permit the recipient sectarian schools to select for their use educational equipment and materials capable of diversion to sectarian or general school administrative uses, as well as library books and other materials prescreened only by title and not content, violates the Establishment Clause especially when those items are placed under the immediate and continuing control of the religious school authorities and are not of a nature generally intended for continuing use by an individual student.

2. Whether administration of a State program allocating specific tax monies for the discretionary selection of fungible school supplies to be used generally by administrative and teaching staff of participating sectarian schools violates the Establishment Clause, particularly when the supplies are not monitored or controlled as to class or other use.

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STATEMENT OF THE CASE

A. The Character And Purpose Of The Institutions Benefitted

In the 1990 Order and Reasons on the cross-motions for summary judgment, Judge Heebe found that of the 46 nonpublic schools participating in the Jefferson Parish Chapter 2 program, 41 are religiously-affiliated and 34 of them are Catholic. Pet. App. at C8.. Seventy-six percent of the nonpublic schools participating in the State Library Materials and School Supplies program under La. Rev. Stat. Ann. §§ 17:351-52 in Jefferson Parish are religiously-affiliated, and those schools receive 89% of the funds allocated under the State program for nonpublic schools. *Id.* Judge Heebe found that the participating Catholic schools require attendance at daily religion classes, conduct sacramental preparation classes, require attendance at Mass, and provide for religious extracurricular activities. *Id.* at C9.

The Archdiocese and the individual schools publish policy statements under which the schools operate. Judge Heebe found that these statements show the pervasive sectarian nature of the schools and that they are institutions in which "education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is consistently maintained." *Id.*

One of the responsibilities of a parochial school principal is to be a "Spiritual Leader" who "integrates a religious studies curriculum that incorporates the basic truths and teachings of the Church and a moral education program that challenges students to hold a rational basis for the values they hold; affords an environment for committed teachers to fulfill their

mission as Christians to teach the Gospel; and offers parents opportunities for partnership with the school in the religious education of their children." S.J. Vol. V, Jenkins Dep. Ex. 25 at 13-14 ¶ 1230.03.

The Archdiocese's curriculum objectives state "[t]he distinctive purpose of the Catholic schools is to proclaim the Gospel message, to build community, and to educate. Within the school community the teachers, priests, parents, and students experience together what it means to live a life of prayer, community and personal responsibility and freedom reflective of the Gospel values manifesting peace, brotherhood, love, patience, and respect for others." *Id.* at 38 ¶ 6110.

The court also observed that "virtually every handbook of the Archdiocesan schools reveals the pervasive religious character of the schools." *Id.* at C12. The court then found "that the schools operated under the auspices of the Archdiocese, the majority of the schools receiving Chapter 2 aid, are pervasively sectarian." *Id.*

The record shows the extent to which sectarian teachings are interwoven throughout everyday school life. Howard Jenkins, Superintendent for the Archdiocese's parochial schools, testified Catholic beliefs and doctrines are taught in religion classes, and they are part of the school curriculum. S.J. Vol. V, Jenkins Dep. at 113. But religion is discussed too in secular classes. *Id.* at 112-13. In fact, at Christ the King Parish School teachers are even told that "[c]lassroom decorations need to be religious, educational and decorative." S.J. Vol. V, Jenkins Dep. Ex. 12 at 18.

Alvin Murphy, the President of Archbishop Chapelle, testified:

> Our teachers, whether they are religion teachers or not, are certainly instructed that when issues come up in the classroom that have a religious, moral, or value concept, that their answers be consistent with the teachings of the Catholic Church and that they respond in that way to the students, so that there can be opportunities in other classes other than religion where discussions of religion could take place. . . .

S.J. Vol. V, Murphy Dep. at 27.

Murphy said that at Archbishop Chapelle all students are required to take religion or theology all four years they are there. *Id.* at 15. He testified "[t]he whole focus of it was to teach the children what the teachings of the Catholic Church are and to develop those activities that give those students the opportunity to practice that belief. At Archbishop Chapelle, no child may be excused from the religion or theology classes." *Id.* at 16-17.

In addition to the regular religion classes, the entire student body attends a monthly Mass, and each year students attend a one-day religious retreat. *Id.* at 20. Each class begins with prayer. *Id.* at 21. In each classroom, there is a crucifix and a statue of the blessed mother. *Id.*

The Student and Parent Handbook for St. Christopher School advises that "[i]n conformity with the basic principle of Catholic education, St. Christopher School places religious instruction and religious worship at the center of its program of studies and activities, and strives to develop a total environment which will enable its students to develop as full Christians." S.J. Vol. V, Jenkins Dep. Ex. 9 at 1. Similarly, Christ the King's Handbook advises that "[m]oral and spiritual training is an integral part of all educational classes at our

school." S.J. Vol. V, Jenkins Dep. Ex. 10. Our Lady of Perpetual Help School states one of its objectives is "[t]o teach specifically Catholic principles and Christian values." S.J. Vol. V, Jenkins Dep. Ex. 11. St. Cletus School advises "that the scope of its teaching and the effort to integrate all learning with faith distinguish the Catholic school from other forms of the Church's educational ministry to youth and give it special impact. S.J. Vol. V, Jenkins Dep. Ex. 17.

At our Lady of Prompt Succor School, the Handbook states that "[i]n addition to strong classroom emphasis on the Catholic Faith, our children are required to attend Holy Mass weekly. Also opportunities are given, on a regular basis, for our children to receive the Sacrament of Penance." In addition, parents and students are advised that "[a]part from their Student Masses, it is required that our Catholic children worship at Mass every Sunday." S.J. Vol. V, Jenkins Dep. Ex. 18.

St. Mary Magadalen School's Parent-Student Handbook states:

> The primary goal of the curriculum in the Catholic Schools in the Archdiocese is to provide those learning experiences most conducive to inculcating in students virtues, knowledge, understanding, and skills necessary for the student's spiritual, intellectual, social, cultural and physical development, in keeping with the stated philosophy of our school.

S.J. Vol. V, Jenkins Dep. Ex. 3. at 17. The school describes the "aim and purpose of St. Mary Magadalen School [is] . . . to create and provide experiences for the students, to proclaim the Gospel message, to worship and pray together, to know what it means to live and serve interdependently, to

build family and community in society, to be educated fully in order to be successful in the present and future society, shaping the world by their Christian Visions and Values." S.J. Vol. V, Jenkins Dep. Ex. 3a.

The Teacher's Handbook for St. Mary Magadalen admonishes that "[t]eachers should instruct the students in the content of their subject matter as well as in faith, morals, and the development of good Christian values." S.J. Vol. V, Jenkins Dep. Ex. 35 at 7.

St. Benilde School's Policy Handbook states:

> The integration of Christian truths and values within the framework of the learning experiences characterizes the educational approach of St. Benilde. In all its curricular endeavors, St. Benilde School strives to provide educational opportunities that will enhance the continued growth and development of its students. Religion is considered the most important subject in the curriculum and is taught on a daily basis.

S.J. Vol. V, Jenkins Dep. Ex. 4 at 5.

The district court also found that at least some schools exercise a religious preference in accepting students and in charging tuition. Further, the Archdiocese's official policy calls for a religious preference in teacher hiring. The contracts for principals and teachers in archdiocesan schools allow termination for observing a lifestyle contrary to church teachings. *Id.* at C8-C9.

The Handbook of Policies for St. Clement of Rome School restricts admissions and advises:

1. Parents are required to be members of St. Clement of Rome Parish.

2. Parents must strive to live out their faith commitments by joining along with their children in the regular Sunday worship of their faith.

3. They must show allegiance to St. Clement of Rome Parish by participation in the organization of the Parish.

4. They agree to cooperate with school authorities in disciplinary matters dealing with their child (children).

5. They conscientiously practice stewardship.

S.J. Vol. V, Jenkins Dep. Ex. 5 at 2.

Thus, Judge Heebe concluded that "instruction in religious truth and values is an integral part of the school program. *It is not one more subject alongside the rest, but instead it is perceived and functions as the underlying reality in which the student's experiences of learning and living achieve their coherence and their deepest meaning.*" Pet. App. at C10.

The Catholic schools discriminate in hiring. The Archdiocese policies on parochial school principal qualifications include the requirement that the individual:

Be a Catholic for whom loyalty to Christ, His people, and the Church are of first importance and hold a philosophy of education consistent with this Catholic conviction. [*Id.* at 12 ¶ 1230.01].

Teachers employed in the **Archdiocesan** schools should preferably be Catholics who have a knowledge of and

> commitment to the Catholic faith and to Christian living. In hiring non-Catholics, care should be taken that they also have a knowledge of the Catholic faith and a commitment to Christian living. [*Id.* at 17 ¶ 2110.01].

Our Lady of Divine Providence School Handbook states that Christian educators at its school are "[t]o create an environment of Christian living in all areas of school life where the 'Witness of Jesus' is proclaimed through values lived and taught in the school to the students who will become the adults of the future." S.J. Vol. V, Jenkins Dep. Ex. 6 at 3. Further, the handbooks states that the school "is a Catholic School in every aspect of its program, therefore, children of other faiths may wish to attend. However, it must be fully understood that they must participate and receive grades in the study of Catholic Doctrine." Its faculty handbook requires a prayer table in each classroom upon which "either the Old and New Testament displayed, along with only other religious articles deemed appropriate." Further, "[i]t is the responsibility of the religion teachers to see that these tables are erected and secure the articles for display." S.J. Vol. V, Jenkins Dep. Ex. 32 at ¶ 41. Further, at that school, each teacher is to attend his or her grade level family Mass. *Id.* at ¶ 51.

St. Benilde School Teacher's Handbook quotes from "To Teach as Jesus Did," stating:

> Integration of religious truth and values with the rest of life is brought about in the Catholic school not only by its unique curriculum but more importantly by the presence of dedicated teachers who approach an integrated approach to learning and living in their private and professional lives.

S.J. Vol. V, Jenkins Dep. Ex. at 10.

The parochial school is also an integral part of the church itself. The Handbook of Policies and Regulations for Elementary Schools of the Archdiocese of New Orleans states:

> The Pastor is the **spiritual** and **temporal shepherd** of the **parish**. . . . A portion of this responsibility is carried out through the parochial school. . . .
>
> Since financing the school is a major responsibility, the **pastor** must assume a significant role in the development of the total parish budget. Therefore, he must make a determination of the amount of subsidy that can be allocated to the **parish school**.

S.J. Vol. V, Jenkins Dep. Ex. 25 at 10 ¶ 1210. Thus, school expenditures have a direct effect on the parish church.

B. The Nature Of The Aid Provided Under Chapter 2

Chapter 2 is provided to schools, not individual students. It is the nonpublic school that decides whether to participate in Chapter 2, and if the school opts not to participate their students receive no Chapter 2 benefits. S.J. Vol. II, Woodward Dep. at 41-42. The school decides in which program under Chapter 2 it wish to participate, and it need not be the same program as the public school. *Id.* at 28-29.

Chapter 2 provides financial assistance through "block grants" to state and local educational agencies to implement 9 "innovative assistance programs." 20 U.S.C. §§ 7311(b); 7312(a)(c)(1); 7351. *See also* Pet. App. A47.

Daniel Lewis, the head of the Chapter 2 program in Louisiana, testified about the reauthorization of Chapter 2. He said although computer hardware could be selected by a nonpublic school as part of its allocation without being tied to a specific need, S.J. Vol. II, Lewis Dep. at 17 and 18, other instructional equipment, such as overhead projectors, may still be purchased under Chapter 2 as long as the nonpublic school demonstrates a need for the equipment. *Id.* at 22-24, 28.

Not all nonpublic schools eligible to participate in the Chapter 2 program do so. In fact, nonpublic schools may elect *not* to participate. Lewis Dep. at 80. Lewis indicated that the Episcopal High School in Baton Rouge has elected not to participate because they had enough money without participating in the program, *id.* at 81, and they did not want to have the "feds necessarily looking over their shoulder on what they're doing." *Id.* at 82. Students who attend a non-participating nonpublic school receive no Chapter 2 benefits. *Id.* at 84-85. Each year, an allocation of Chapter 2 funds is made for each participating nonpublic school on a per capita basis by the number of children. *Id.* at 86-87.

As Chapter 2 is administered in Jefferson Parish, the nonpublic school determines what items it would like to purchase consistent with its allocation, and "[t]he only time [the] local school districts have rejection rights over a non-public school's wish or a non-public school's use of the dollars, is if it's in violation with the law." *Id.* at 89-90.

The State has no requirements as to the selection of the various items by the nonpublic schools since that is left up to the LEAs to decide with the nonpublic school authorities. *Id.* at 96. An LEA is not limited in the type of material that a nonpublic school may elect. *Id.* at 97.

C. Insufficiency Of Any State Chapter 2 Safeguards

The State encourages, but does not require, LEAs to obtain assurances from nonpublic schools that they will not use the Chapter 2 items supplied for sectarian purposes. S.J. Vol. I, Lewis Dep. at 102-03. Thereafter, both the State and LEA conduct infrequent and announced monitoring visits. *Id.* at 103. Lewis testified that each year he normally visited only one or two nonpublic schools within each school district. *Id.* at 104.

The State requires LEAs to make monitoring visits at least once a year. *Id.* at 105. But the State receives no reports concerning those monitoring visits. *Id.* at 105-06. When the State reviews the LEA's monitoring process, it only ascertains the LEAs have a schedule and check the criteria used. *Id.* at 152.

Lewis testified he would not expect an LEA to be able to determine on a monitoring visit whether educational equipment had been used for sectarian purposes. *Id.* at 106. Although Lewis said he advised LEAs to check whether items furnished were secular, neutral, and nonideological, he indicated it would be impossible to know by examining the equipment. He also said it would be as difficult to make the same determination of reference books because "you can't always judge a book by its cover." A title might sound sectarian and might not be. On the other hand, a book might sound secular and be very religious. *Id.* at 134.

Lewis agreed only *unannounced* visits would be helpful. *Id.* at 133. But no unannounced visits are made at either the State level in Louisiana or the local level in Jefferson Parish.

Lewis confirmed that books purchased under Chapter 2 in

Louisiana are *not* selected from some approved list circulated by the State. *Id.* at 136. And, in fact, nonpublic schools are *not* even furnished catalogs with suggestions as to books to be ordered. *Id.* at 136-37. When Lewis visited the one or two nonpublic schools within a school district on the State's monitoring visit, although he looked at books purchased under Chapter 2, he only spent about 5 to 10 minutes doing so. *Id.* at 138.

Further, the State does nothing to ascertain if the materials, equipment, books, or whatever else is purchased with Chapter 2 funds and supplied to nonpublic schools have reduced the amount of money the nonpublic schools have budgeted for library and educational equipment. *Id.* at 145-46.

In March of 1985, the State wrote the U.S. Department of Education in response to an on-site assessment by the federal government of Louisiana's administration of Chapter 2 block grants saying it would increase the number of annual visits of the LEAs from one-third to one-half. The State attempted to do this but then had to revert back to the three year monitoring cycle due to lack of manpower. *Id.* at 146-47.

Lewis testified that an assurance given by a nonpublic school is only a statement of good intent and that the State does not attempt to enforce such assurances. *Id.* at 180.

The last guidelines issued by the State, which is part of this record (*see* S.J. Vol. II, Lewis Ex. 28 at 18), showed the monitoring process the State follows concerning Chapter 2 is loose and infrequent:

> If the Chapter 2 program includes projects that would best be viewed at a school site, a visit to a school should be arranged, or school personnel could be called to the

meeting location. If there are eligible nonpublic schools participating, a visit to one of them is requested. Any visit should be made to those schools in close proximity to the location of the meeting. *Id.* at 18. According to the guidance, it was recommended that the on-site meeting be held where Chapter 2 records were located and unless there were serious areas of concern, "the Bureau of Consolidated Education Programs will monitor current Chapter 2 programs every third year."

Id.; S.J. Vol. II, Lewis Dep. at 39-41.

The new guidance provided for a new monitoring form which included the question: "Are the services, materials, equipment, or other benefits provided to nonpublic schools secular, neutral and non-ideological?" However, Lewis acknowledged there was no way through monitoring one could determine whether educational equipment, such as computers, has been diverted for sectarian use. S.J. Vol. II, Lewis Dep. at 44-45; *see also* Lewis Dep. Ex. 28 at 22 ¶ 11.

D. Insufficiency Of Jefferson Parish's Chapter 2 Safeguards

Ruth Woodward, the Chapter 2 coordinator for Jefferson Parish, testified she was "responsible for distribution of funds to those schools for the purpose of instructional materials, equipment and supplies." S.J. Vol. II, Woodward Dep. at 17. She testified nonpublic schools selected the materials to be ordered. *Id.* at 33. Projects for which Chapter 2 items are purchased are determined once every three years by the nonpublic schools. *Id.* at 132-33.

After Jefferson Parish receives the Chapter 2 allocation from the State, Woodward notifies each nonpublic school of

the allocation provided for their school. The nonpublic school then checks off an equipment list furnished by Woodward what equipment they want, and the nonpublic school then orders those items from the book jobbers or from suggested vendors. *Id.* at 131.

Once the orders are received, requisitions are attached and forwarded to the school district purchasing department. When the orders are received by the school district's warehouse, they are merely checked against the requisition, labeled, and distributed to the schools. *Id.* at 137. In fact, the items are sometimes shipped by the vendor directly to the school. *Id.* at 138.

Although it is claimed that the Chapter 2 equipment and materials are "loaned" by the public school district to the nonpublic schools, the public school district provides no maintenance or repair. The public school system views this as the nonpublic school's responsibility. *Id.* at 139-40. And once the items were turned over to the schools, the school district never received any of the items back with the exception of the 191 books found to be sectarian. *Id.* at 142.

Woodward testified there was no predetermined approved list supplied to nonpublic schools from which to select library and media materials. Selections are made by nonpublic school personnel by looking at their own catalogs. *Id.* at 37. When ordering books for nonpublic schools, Woodward only looks at the book title. *Id.* at 67-68. She confirmed that nothing in the selection process would cause her to look at anything else. *Id.* at 68. This title review is the only screening done by the school district even though in 1985 191 books deemed to be sectarian were ordered by assorted nonpublic schools using Chapter 2 funds. *Id.* at 74-75. This title review is conducted by Woodward and her staff. *Id.* at 78-79. And the only

instruction Woodward gives to her clerical staff is that if by looking at the title they think there is anything other than secular content, they should notify her. *Id.* at 79. Woodward has never gone beyond looking at the titles to ascertain the content of a book, nor has anyone else in the school district. *Id.* at 83-84. She was the final authority as to whether a Chapter 2 book selected by a nonpublic school should be ordered. *Id.* at 89.

Since May 1, 1985, Woodward has seen book titles she thought might not be secular. But when this occurred, she just crossed out the selection without further inquiry. *Id.* at 90. This suggests that even though assurances have been provided and nonpublic school personnel have been advised that sectarian books may not be selected, the nonpublic schools continue to order sectarian material.

Computers furnished to nonpublic schools by the school district may be used for a variety of purposes, including the printing of church bulletins. *Id.* at 148. Woodward testified she does nothing to monitor computer use. *Id.* at 149.

Woodward, like Lewis, acknowledged there was no way she could know whether educational equipment was used to teach religion. *Id.* at 92. She goes on-site to monitor each of the nonpublic schools once a year, spending only from 45 minutes to 2 hours at each visit. *Id.* at 96-97. Her visits are pre-announced, and her letter indicates what items should be available for her viewing. *Id.* at 97. Usually the principal meets with her and the school's Chapter 2 contact person, usually the librarian. *Id.* Woodward then makes a random check of materials and equipment that have been purchased with Chapter 2 funds. *Id.* at 97. In doing this, she checks to ascertain if the items have been appropriately labeled and that recordation of their use has been attempted. For example, in

the case of a library book, she checks to see how many people are in fact using it. *Id.* at 98. She also determines if use of equipment was recorded but provides no forms for the school to use. *Id.* at 98. But Woodward admitted there would be no way to know from her on-site visits whether material or equipment are used for proper purposes. *Id.* at 100-01.

In her monitoring visits, Woodward never inquires about the content of the class which has used the educational equipment. For instance, if the equipment was used in a science class, she does not ask whether science is taught according to the creation concept. *Id.* at 117. And in her orientation sessions, there is no discussion concerning what might be sectarian and what might be secular. *Id.* at 118. Woodward never makes *unscheduled* on-site monitoring visits and normally advises of her monitoring visits one month in advance. *Id.* at 120.

Although there are people who use the materials and equipment in addition to the Chapter 2 contact persons, Jefferson Parish has devised no process to ensure that these people have been informed that the materials and equipment are to be used only for secular, neutral, and nonideological purposes. *Id.* at 126-27. Also, Woodward does not require the items furnished be secured against unauthorized use. *Id.* at 123-24. Further, she can't ascertain if equipment was used for sectarian purposes. *Id.* at 127-28.

The only request for the purchase of instructional equipment that has ever been turned down while Woodward was the coordinator was wiring for St. Martin School. Although she had judged it not to be a violation "because the wiring . . . could be removed from the facility," this was subsequently rejected by the State. *Id.* at 135-36. In fact, she has never rejected any equipment request. *Id.* at 136.

Woodward understands the "supplement and not supplant" requirement as prohibiting the *replacement* of equipment, materials, or supplies that had been originally purchased with either local or State money. For example, there would be a supplanting if a new typewriter was purchased to replace one which had originally been purchased with State funds. She understood the requirement is not violated if it is demonstrated that it is for a new program. *Id.* at 152-56.

Woodward also understands Chapter 2 allocations may be used by nonpublic schools to purchase educational equipment to provide in-service programs to train faculty and staff at nonpublic schools. *Id.* at 164-66.

E. Louisiana Library Book And School Supply Program

Under the Louisiana Library Book and School Supply program, La. Rev. Stat. Ann. §§ 17:351-54, schools are given an allotment with which to order various supplies, as well as library books. The available supplies include pencils, construction paper, newsprint, copy paper, and similar items. Cannon Dep. Ex. 7. Also available through the State are software, film strips, and similar items. Cannon Dep. Ex. 9; Kropog Dep. Ex. 5; Junkin Dep. at 131-33.

Marie Cannon, the Principal at St. Anthony's School, testified about purchases that were made for school supplies. Cannon Dep. at 91-109; Cannon Dep. Ex. 7. The order forms indicated large purchases of number 4 bond copier paper. When Cannon was asked about the ordering of 451 reams of copier paper at a total cost of $915.53, *id.* at 96, she testified it was for general classroom use. *Id.* at 97. It was located in a storage room for common use by all including religion teachers. *Id.* at 108-09. There is absolutely no monitoring of this program by the school district or the State. *Id.* at 108-09.

REASONS THE WRIT SHOULD BE DENIED

1. Petitioners argue that *Agostini* expressly rejects the general proposition that "government aid that directly aids the educational functions of religious schools is invalid." But what this Court actually stated is it has "*departed* from the rule relied on in [*Grand Rapids Sch. Dist. v.] Ball*, [473 U.S. 373 (1985)] that all government aid that directly aids the educational functions of religious schools is invalid." *Agostini*, 117 S. Ct. 2011 (emphasis supplied).

This Court did not say that the general proposition has been rejected. In fact, the Court stated that "the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar [v. Felton*], 473 U.S. 402 (1985), was decided." The exception to the general rule is when the aid flows to the school, not as a result of specific governmental (state) direction but instead as a result of private decision-making. *Id.* at 2011-12.

But here the aid flows directly to the sectarian schools in Jefferson Parish as a result of joint government and sectarian school decision-making. In fact, the Secretary of Education in his brief noted that this is "a federal program that provides financial assistance to Local Educational Agencies (LEAs) for education-improvement programs, and authorizes LEAs receiving federal financial assistance to lend instructional equipment, instructional materials, and library materials purchased with that assistance to private elementary and secondary schools, including religious schools . . . ." Brf. of Sec'y at 1. The Jefferson Parish Public School System ("JPPSS") has provided the nonpublic schools with practically unfettered discretion as to how their share of the Chapter 2 allocation will be spent. In essence, JPPSS has issued to the

participating sectarian schools what amounts to a credit card for use of up to the full extent of their Chapter 2 allocation.

Neither the parent nor the student decides: (1) whether the school will participate; (2) the nature of the project -- that is which students and/or teachers will be targeted by the program; and (3) exactly what items will be provided. Further, in Jefferson Parish, the items purchased and provided to the sectarian schools remain for the school's use long after a given student leaves, whether during the school year or after completion of the student's enrollment. At all times the items provided are under the *immediate control*, not of the student or the LEA, but of the sectarian school authorities.[1] If the no direct aid principle is no longer of constitutional significance, there was no reason for the *Agostini* Court to note that:

> While it is true that individual students may not directly apply for Title I services, it does not follow from this premise that those services are distributed "directly to the religious schools . . . ." In fact, they are not. . . . Title I funds are instead distributed to a *public agency* (an LEA) *that* dispenses *services directly to the eligible students within its boundaries, no matter where they choose to attend school.*

117 S. Ct. at 2013 (first emphasis in original; second emphasis supplied).

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[1]The Secretary of Education, in his brief, acknowledged that "the *Agostini* decision, and the decisions on which it relied . . . involved the distinct situations of instructional assistance provided directly to religious school students by public school personnel, and cash assistance provided directly to students (rather than religious schools) by public authorities." Brf. of Sec'y at 25.

2. Petitioners claim that the court of appeals improperly focused on the character of the State aid to parochial schools rather than on the *Lemon v. Kurtzman*, 403 U.S. 602 (1971), test, as modified by *Agostini*. Pet. at 10. But, in *Agostini*, 117 S. Ct. at 2015, this Court stated:

> Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is "excessive" are similar to the factors we use to examine "effect." That is, to assess entanglement, we have looked to "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." [*Lemon*, 403 U.S.] at 615.

The *Agostini* Court said it still continues to explore whether the aid has the "effect" of advancing or inhibiting religion. 117 S. Ct. at 2010. But the Court maintained the criteria used to assess whether aid to religion has an impermissible effect has changed somewhat. It has such an effect if there is *State inculcation* of religious beliefs; however State inculcation is no longer presumed by the mere placement of public employees on parochial school premises. *Id.* Also, State inculcation is deemed not to have occurred when the aid is distributed directly to the student, and the aid (such as a college vocational tuition grant or the employing of a sign-language interpreter to be used in the classroom) may be used at any school chosen by the recipient student. *Id.* at 2011.

It is true that in *Committee for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980), this Court permitted direct reimbursement to sectarian schools for administering State prepared and State required recordkeeping. But since "[the] nonpublic school does not control the content of the test

or its result," the arrangement "avoid[s] the kind of direct aid forbidden by the Court's prior cases. *Id.* at 656. *Regan* explained that "if the grading procedures could be used to further the religious mission of the school, serious Establishment Clause problems would be posed under the Court's cases, for by furnishing the tests it might be concluded that the State was directly aiding religious education." *Id.* at 657. The fact that the State had effective control over the testing process by the use of standardized tests with the grading also being under the control of the State, *id.* at 655-56, was thought to eliminate any possible use of the testing and scoring process for the school's religious mission.

Clearly, the court of appeals in this case used the appropriate constitutional analysis by focusing on the character of the State aid, and its analysis is perfectly consistent with the *Lemon* test as modified by *Agostini*.

The Secretary of Education's brief at page 12 acknowledges that the court of appeals not only relied on *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977), but also on *Committee for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980), in concluding that "the 'boundary lines' between permissible and impermissible assistance" was dependent on the character of the aid. In *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995), *reh'g and reh'g en banc denied*, 62 F.3d 300 (9th Cir. 1995), the court concluded the decision in *Regan* had undermined *Meek* and *Wolman*. Judge Livaudais' ruling on summary judgment issued on January 28, 1997, embraced the

Walker analysis of *Regan*. Pet. App. at B30.[2]

What is significant about *Regan* is there this Court relied heavily on Justice Powell's concurring opinion in *Wolman*. *Regan*, 444 U.S. at 661-62. In fact, Justice Powell's concurring opinion has lighted the way for a practical and logical analysis of where the line should be drawn in this area of Establishment Clause jurisprudence. His concurring opinion was, in fact, aimed at explaining his agreement with the furnishing of textbooks to students validated in *Board of Educ. v. Allen*, 392 U.S. 236 (1968), as well as his agreement with the Court invalidating the loaning of instructional materials and equipment in *Meek*. In a few brief words, he has encapsulated the constitutional analysis implicit in the long line of Establishment Clause decisions dealing with the issue present here.

Justice Powell observed that "the Court [in *Meek*] reaffirmed *Allen*, thereby necessarily holding that at least some such loans of materials helpful in the educational process are permissible -- *so long as the aid is incapable of diversion to religious uses, . . . and so long as the materials are lent to the individual students or their parents and not to the sectarian institutions.*" *Wolman*, 433 U.S. at 263 (emphasis supplied). Thus, whether the grant or loan of educational equipment and materials are either divertable to religious purposes *or* provided directly to the pervasively sectarian school is the key.

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[2]It is significant that the brief of the Secretary of Education clearly seeks to distance itself from the *Walker* decision when it states: "We do not suggest that the Ninth Circuit properly concluded that it was not bound by *Meek* and *Wolman*." Brf. of Sec'y at 22 n.12.

Justice Powell's reasoning and knowledgeable view of the educational process is in sharp contrast to the suggestion of the Secretary of Education that this matter should be remanded to determine divertability of the items provided and effectiveness of safeguards in place. It also absolutely rejects petitioners' analysis. Justice Powell observed in *Wolman*:

> Here the statute is expressly limited to materials incapable of diversion. Therefore, the relevant question is whether the materials are such that they are "furnished for the use of *individual* students and at their request" citing *Allen*, 392 U.S. at 244 n.6.

Id. at 263 (emphasis in original).

Justice Powell also distinguished between actual loans to students (such as textbooks in *Allen)* and "loans" to students of items like overhead projectors which are a "transparent fiction," a ruse for furnishing aid directly to the sectarian schools. And he found permissible only the "lending to the individuals themselves [of] only appropriate instructional materials and equipment similar to that customarily used in public schools." *Id.* at 263-64. This reasoning is in accord with the court of appeals decision here.

4. Petitioners argue that in this case no funds reach the coffers of participating religious schools. But whether the benefits provided are in the form of cash or in kind is not constitutionally relevant. In *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993), this Court quoting from *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 487 (1986), stated:

> [T]he State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is

"that of a direct subsidy to the religious school" from the State.

See also Wolman, 433 U.S. at 251. Likewise, in *Board of Educ. v. Allen*, 392 U.S. 236 (1968), an indirect aid case involving the furnishing of textbooks to students, the Court observed that "no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." From a practical standpoint, the sectarian schools in Jefferson Parish were provided the equivalent of money -- that is credit to buy the items they wanted up to the extent of their allocation.

5. Petitioners contend that neither the respondents nor the Fifth Circuit cite any instance of diversion of Chapter 2 equipment or materials to religious use. But obviously the purchase of 191 books furnished to various sectarian schools belies this assertion. *See also infra* at 13; S.J. Vol. II, Woodward Dep. Ex. 21; and Pet. App. at B13. In fact, the brief of the Secretary of Education noted there had been "occasional lapses from Title VI's requirement of secularity." Brf. of Sec'y at 9 n.4.

6. Petitioners contend "the constitutionality of Chapter Two and the State's Library Book and School Supply statute depend upon the second and third [effect] and [entanglement] prongs of the *Lemon* test, as modified by *Agostini*." Pet. at 9. But they fail to discuss why the Chapter 2 and State programs do not bring into play the "excessive entanglement" concern expressed in this Court's Establishment Clause jurisprudence.

Significantly, the Secretary of Education's brief at 27-28 does recognize that employing sufficient safeguards to ensure the items furnished to sectarian schools must not be so intrusive that "they inhibit the ability of religious schools to

fulfill their religious mission, or otherwise require 'excessive and enduring entanglement.'" But sufficient safeguards, with regard to improper use of furnished items, would result in excessive entanglement. And no remand is necessary to reach that conclusion.

In *Marburger v. Public Funds for Public Schools*, 358 F. Supp. 29 (D. N.J. 1973), *aff'd mem.*, 417 U.S. 961 (1974), the Court dealt with a program, like here, that required the items supplied to be used only for "secular, neutral, and nonideological purposes." But the *Marburger* court stated:

> Although it is obvious that "supplies," "instructional materials," and "equipment" are inherently neutral, the uses to which they can be put are clearly varied. Most of these items obviously can be used with equal facility in the teaching of religious studies, as well as they can be used for the teaching of secular-nonideological subjects.

Id. at 38-39.

Agostini does not undermine this constitutionally required diversion concern expressed by the Secretary of Education. It is true that *Agostini* concluded there was no excessive entanglement problem in New York's Title I program. But it reached such a conclusion after finding that the factors necessary to determine excessive entanglement required a focusing on the character and purpose of the institution, the nature of the aid, and the resulting relationship between the government and religious authority.

In this case, we do not merely presume that the recipient sectarian schools in Jefferson Parish are pervasively sectarian. Rather, the Court made a specific finding that "the majority of the schools receiving Chapter 2 aid, are pervasively

sectarian." Pet. App. at C12. The court also held that "[a]t least some of the school's exercise religious preference in accepting students." *Id.* at C8. And "[t]he official policy of the Archdiocese calls for a religious preference in the hiring of teachers." *Id.* at C9. Of major importance also is the court's finding that the atmosphere of the participating Catholic schools "is dedicated to the advancement of religious belief." And the record as well establishes that in these schools religious teachings and values are not compartmentalized in the religion class. Rather, they are in the eyes of the parochial school authorities appropriate topics for discussion in what might normally be viewed as a secular class. *See infra* at 2-6. Thus, checking once a year or even once a month the usage "logs," as suggested by the Secretary, would not be adequate to determine whether the items had been used to advance religious teachings and values. Further, because sectarian values so completely permeate the instructional and extracurricular aspects, as well as the very purpose, of the institution, any usage whatsoever necessarily advances the religious mission of the sponsoring church.

The reasoning of this Court in *Lemon*, 403 U.S at 618-19, on this question is as sound today as it was in 1971, when this Court stated:

> We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion.

> Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between the teacher and religious authorities over the meaning of the statutory restrictions.

Justice Brennan, in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 343 (1987), cogently noted that "[w]hat makes the application of a religious-secular distinction difficult is that the character of the activity is not self evident." Inquiry would be required into teachings and discussions of the "secular" classes in sectarian schools such as those participating in Jefferson Parish's Chapter 2 program. As *Lemon*, 403 U.S. at 635, noted, "[n]o matter what the curriculum offers, the question is, what is *taught*? We deal not with evil teachers but with zealous ones who may use any opportunity to indoctrinate a class."

Even the prospect of adequate monitoring, even if not conducted within each classroom regularly on an ongoing day-to-day basis itself raises yet another major constitutional problem as expressed by Justice Brennan in *Amos* that

> this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would

be shaped in part by the prospects of litigation.[3]

Id. at 343.

It was no doubt such a concern that caused the *Marburger* court, and subsequently this Court on affirmance, to conclude that the providing of educational equipment, books, and materials (such as those provided under Chapter 2 and supplies furnished under the State program) must be prohibited regardless of the so-called safeguards. 358 F. Supp. at 38-39. *Agostini* is not to the contrary. No such dilemma existed there. The New York Title I program was designed and fully administered by public school employees in classrooms dedicated to Title I with the equipment and materials being secured for only Title I use. *Agostini*'s program fully compartmentalized the secular teaching from any sectarian involvement. Thus, any monitoring could not result in excessive entanglement. As Justice O'Connor explained in her dissent in *Aguilar v. Felton*, 473 U.S. 402, 427 (1985), "[i]t is not intuitively obvious that a dedicated public school teacher will tend to disobey instructions and commence proselytizing students at public expense merely because the classroom is within a parochial school."

Further, the compartmentalized Title I program in New York where the public school authorities (1) maintain sole responsibility for selecting students; (2) administer their own tests for determining eligibility; and (3) do not engage in religious activities of the sectarian schools or introduce any religious matter into their teaching can in no way be deemed

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[3] "A case-by-case analysis for all activities therefore would both produced excessive government entanglement with religion and create the danger of chilling religious activities." *Id.* at 343-44.

to be "sectarian." As this Court stated, the "degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution." *Hunt v. McNair*, 413 U.S. 734, 746 (1973), citing *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971). Thus, what this Court said concerning excessive entanglement in an *Agostini*-type program has absolutely no relevance to the Chapter 2 program here as administered in Jefferson Parish.

7. Only the State petitioners seek a writ of certiorari on the State Library Book and School Supplies statute, La. Rev. Stat. Ann. §§ 17:351-352, but set forth no specific reasons why this Court should review the court of appeals decision concerning that program. That program provides no monitoring at all and even fungible items, including large quantities of xerox paper, have been used generally and made available to teachers of religion classes. *See infra* at 16.

There is no split in the circuits on this program. No circuit nor any district court has concluded it is constitutionally permissible to provide fungible items to sectarian schools, particularly when the program has been carried out without providing any monitoring or obtaining assurances. This is particularly true where, as here, the record indicates such items have been used by all teachers, including those who teach religion. Regardless of what this Court may do with regard to the Chapter 2 question, no review is called for as to the State program.

8. The Secretary of Education apparently seeks to have this Court "consider the Department of Education's recent post-judgment Title VI Guidance." Brf. of Sec'y at 27. Clearly, such an adventure would call upon this Court to render an advisory opinion which it is prohibited from doing. This case

is ill-suited to be used as a vehicle to determine the extent of safeguards which the Department of Education has waited for more than 15 years, and after the judgment of the court of appeals below, before providing such guidance.

This case was filed in 1985 -- 15 years ago. At each stage, respondents contended that the Jefferson Parish program was defective because divertable items were provided and the program also provided direct aid to pervasively sectarian institutions. In 1990 Judge Heebe ruled on cross-motions for summary judgment that Chapter 2 was unconstitutional as administered in Jefferson Parish. He not only relied upon *Meek* and *Wolman*, but also on the diverability holding of *Marburger*. Pet. App. C13-15.

One of the defects in Judge Livaudais' 1997 Order and Reasons vacating Judge Heebe's earlier summary judgment decision was in ignoring the fact that respondents claimed the items were divertable with resultant excessive entanglement if the program was sufficiently monitored. *See* Pet. App. at B23 where Judge Livaudais acknowledged that respondents raised this issue.

Any remand would ultimately require a hearing on the merits by the trial court concerning issues of fact on the questions of "divertability" and "safeguards" unless the court of appeals, after combing the record, concluded that defendants had not disputed those factual questions.

It has been said that justice delayed is justice denied. It has been 15 years since respondents filed this action. It took 4 years for the district court to render its post-trial opinion on issues remaining after originally holding that respondents were entitled to summary judgment on the Chapter 2 issue. Thereafter, it took the district court more than 2 years to

decide the post-trial motions. This case should come to a speedy conclusion.

CONCLUSION

For all the reasons stated above, the Petition for Writ of Certiorari should be denied.

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Respectfully submitted,

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